IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
NOVEMBER 15, 2006 Session

PAUL RUSSELL and wife, VIRGINIA RUSSELL v. I. ALLAN HOWARD, ET AL.

Direct Appeal from the Chancery Court for Coffee County
No. 02-327 Buddy D. Perry, Chancellor

No. M2005-02956-COA-R3-CV - Filed on February 8, 2007

This is an appeal from a nuisance case. The plaintiff landowners filed a complaint alleging a recurring nuisance caused by the construction of a golf course adjacent to their property. The plaintiffs alleged that a part of their property, which was located in a natural drainage pattern even prior to the golf course's construction, became flooded after periods of heavy rainfall as a result of the construction of the fairway and installation of a drainage system by the defendant golf course developers and owners. A trial was held, and the chancery court entered judgment in favor of the defendants. The plaintiffs filed a timely appeal to this Court. We affirm.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Chancery Court Affirmed

ALAN E. HIGHERS, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., and HOLLY M. KIRBY, J., joined.

Mickey Hall, Winchester, TN, for Appellants

Jeffrey D. Ridner, Tullahoma, TN; J. Stanley Rogers, Manchester, TN for Appellees, I. Allan Howard and Marilyn J.Howard

John W. Butler, Knoxville, Attorney for Appellees B&V Systems, Inc. and Willowbrook Golf Club, L.L.C.

OPINION

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This is a nuisance case involving flooding on the plaintiff landowners' property. The plaintiffs, Paul and Virginia Russell ("Appellants"), have resided at the property in question in Manchester, Tennessee, since 1959. Mr. Russell has a B.S. degree in agriculture from Tennessee Tech. He worked as the district conservationist for the Coffee County soil conservation service for approximately thirty years, until he retired in 1985. In May of 1994 the defendants, Allan Howard and his wife Marilyn (collectively, with Willowbrook, "Appellees"), purchased property located next to Appellants' property. The Howards also purchased an additional ten acres from Appellants in July of 1994. Mr. Howard developed his land into a golf course and residential subdivision that would become Willowbrook Golf Club. Mr. Howard sold the property to the present owners, B & V Systems, Inc. and Willowbrook Golf Club, L.L.C. ("Willowbrook"), in January of 2000.

The 3.2 acres of Appellants' property at issue are located adjacent to the sixteenth fairway of the Willowbrook Golf Course. This particular land is located in a pre-existing drainage pattern. Mr. Howard and his crew of workers began construction of the golf course in August of 1994. During the construction of the sixteenth fairway, Mr. Howard and Mr. Russell had informal conversations regarding water drainage from Appellant's property into a lake on the golf course. The specific extent and content of these conversations were disputed at trial, but the method by which Mr. Howard ultimately addressed this drainage was by installing an oval pipe from Appellants' property, located adjacent to the fairway, that was intended to accommodate water runoff after heavy rains, and by filling in the area over and around the pipe with land, which created a dam. Construction on the drainage of the sixteenth fairway began in approximately August of 1994. The gradework of the area of the sixteenth fairway allegedly affecting Appellants was substantially completed in September of 1994. The golf course was open for business in September of 1995.

Mr. Russell first discussed a flooding problem on the affected land with Mr. Howard in December of 1999. Appellant directed Appellee's attention to the occurrence of a lake on his 3.2 acres after heavy rainfalls. At this time, Mr. Howard had contracted to sell the golf course to its current owners. Mr. Howard had received no complaints from Mr. Russell regarding flooding of his property until this time. Mr. Howard did not notify the buyers of Willowbrook of his conversation with Mr. Russell. The sale was finalized in January of 2000.

Appellants filed a complaint in the Chancery Court of Coffee County, Tennessee, on August 5, 2002, against the Howards and Willowbrook. Appellants alleged that "[i]n the course of construction, the elevation of the Willowbrook Golf Club property was raised by approximately five or six feet" and that as a result, their property had "suffered recurring flood problems, increasing in severity throughout the years." Appellants alleged that this was a recurring nuisance that made them unable to develop and resell their affected adjoining property. Appellants asked that the Howards and Willowbrook be enjoined from perpetuating the nuisance and ordered to correct the flow of

water to prevent future flooding, and they sought damages of $150,000 for the loss of the use and enjoyment of their property.

The Howards filed an answer on September 20, 2002, in which they asserted that Appellants had failed to state a claim for which relief could be granted, that Mr. Russell had "assisted with and ratified the design and construction of improvements" during construction of the golf course, that the Howards relied upon Mr. Russell's representations regarding design and construction, that the plaintiffs had waived any rights regarding the change of elevation, and that the plaintiffs were comparatively at fault. Willowbrook filed an answer on March 21, 2003, in which it asserted the defenses of the applicable statute of limitations, laches, and estoppel based upon Mr. Russell's alleged representations. The court entered an agreed order on February 17, 2004, that allowed the Howards to amend their answer to rely on the statute of repose and move for summary judgment. On April 16, 2004, the court allowed a continuance of the summary judgment hearing, at the plaintiffs' request. The summary judgment hearing was held on August 9, 2004, and the court denied the defendants' motion. For unknown reasons, the judge recused himself from this case on January 4, 2005, and the matter was continued until August 15, 2005, for trial before the Honorable Buddy D. Perry.

Trial took place as scheduled on August 15, 2005. Mr. Russell offered several photographs into evidence which showed the 3.2 acres in question in a flooded state after occurrences of heavy rainfall. On direct examination, Appellant testified that he never had flooding problems prior to the construction of the golf course, specifically stating that he had never noticed any standing water before it was constructed and that water had always moved into the drainage path under Highway 55. As to any discussions with Mr. Howard prior to construction, Appellant stated that he remembered one discussion in 1994 or 1995 regarding "the pond closest to Highway 55 and whether the soil would hold water" and another discussion about nine months later with Mr. Howard regarding drainage from Appellants' land into the lake on what would become the sixteenth fairway. In the latter discussion, Appellant claimed that Mr. Russell asked him if he thought that two three foot pipes would carry the water, and Appellant told Mr. Howard that he "didn't think it would take – would have taken that big of pipes, but [Mr. Howard] needed to get an engineer to design the size of the pipes for him, that [Mr. Russell] . . . did not have access to the files, the engineering handbooks and stuff in the office, since [Mr. Russell] had been retired several years then." Appellant testified that although he had done some paid surveying and design work for Mr. Howard in the past regarding other property, he never saw a layout or specifications of the Willowbrook golf course.

Mr. Russell testified that he first observed the "flow problem" on his property in August of 1999:

> And coming back home – we had had a hard rain. And when I did the U – I have to go up to the school and do a U to come back down to turn into my driveway. . . On [Highway] 55. There's a median there, and it's not a crossing right in front of my house. So when I did the U and turned back down, I saw the water down there in the field on my property. So I went to the house, got

> me a raincoat and some boots and walked down there to see what it was. And all this – had a nice lake there. It was flooded, a nice lake.
>
> Well, I came back up to the house, got back in my truck, went up to the – where the road goes into the subdivision on Willowbrook. And water was coming over the top. It was running down across the road. It was running over the top of the [fairway].

Mr. Russell testified that he had a discussion about the flooding with Mr. Howard in December of that year. Mr. Russell later discussed the issue with the new owners of Willowbrook, but nothing was done to correct the problem. Appellant claimed that in 1999, he had been planning to develop his property, including the 3.2 acres in question, into a subdivision containing an access road and 19 lots, but that the flooding made this almost impossible. Appellant testified that the way to "fix [the flooding problem] is to go in there and take out all the dirt and put it back like nature had it to begin with[]" or to "get someone that's an engineer, that's experienced with handling water, to design something that would carry a 50-year storm which would let the water – most of your water, except in an unusually big rain, go on down through there."

On cross-examination, Mr. Russell testified that he had farmed and pastured his land between the years of 1994 and 1999, but that he never noticed the flooding. He also admitted that the construction of the golf course next to his property had greatly enhanced the value of his own twenty-two acres of property. Appellant stated that he had sold Mr. Howard ten acres of land at $2,000 per acre in 1994, and that currently he was asking $10,000 per acre. Mr. Russell also testified that even before the golf course was built, he could not build a house on the affected 3.2 acres, because the land was "in the drainage pattern[.]"

Appellee, Mr. Howard, testified that over the five years between the construction of the golf course and his first conversation with Mr. Russell concerning the flooding in 1999, he had never received a complaint from Appellant. He further testified about the conversation with Mr. Russell during the construction of the drainage system running from Appellant's property to the sixteenth fairway. Mr. Howard testified that before the pipe was installed, Mr. Russell had been present for a discussion in which the golf course designer asked Appellant if they "could get by with an oval tile [pipe]" of a specific size, which Appellant allegedly considered for a moment and reluctantly responded, "Yes. That's okay." He testified that Mr. Russell had been present when the pipe was being installed. Mr. Howard testified that he noticed the water backing up on Mr. Russell's property during the years 1995 through 1999. He also stated that there was no possible way to "take it back to nature" as Mr. Russell had recommended, without local government involvement because there was now a dedicated road that was maintained by the county on the land in question. Two employees of Mr. Howard, who had both participated in the golf course construction, also testified. Both of these witnesses corroborated Mr. Howard's testimony as to the alleged conversation regarding the drainage pipe, Mr. Russell's presence on the work site on at least one occasion during installation of the pipe, and the absence of complaints from Appellant before December of 1999.

Mr. Russell provided additional testimony in rebuttal. He denied having the conversation described by Mr. Howard, and he denied ever being present when the drainage pipe was installed. When asked if the affected acreage was visible from his residence on the property, Mr. Russell testified:

> And you can see the flooded area if you go to the other end [of the house] and open the shades and kind of peep between the trees, you could see it. But, like I said, I had no reason to distrust Mr. Howard, and I never looked down that way. I had no reason. I just – I never went to that end of the house. We slept in there and the shade stayed closed and I didn't look down that way.

The trial court entered a judgment in favor of the defendants on November 21, 2005. In its order, the trial court provided extensive findings, including that the affected 3.2 acres were located in a natural drain on the plaintiffs' property, that this drain existed prior to construction of the golf course, that no water was diverted from the defendants' property to the plaintiffs' property, and that the only difference between the condition of the 3.2 acres prior to and after construction of the golf course was the duration of time water remained in the pre-existing drain. The trial court also found that even in spite of the flooding, the value of the plaintiffs' land was increased due to its proximity to the defendants' golf course, and that Mr. Russell specifically approved of the implemented drainage method. The court 's conclusions of law were as follows:

1. A claim for damages due to a permanent nuisance must be brought within three years of the date of construction of the alleged nuisance.
2. Plaintiffs' claim for damages is time-barred, it having been time-barred at least as early as September 30, 1998.
3. The measure of damages for a permanent nuisance is injury to the value of the fee.
4. The measure of damages for a temporary nuisance is diminution in rental value during the duration of the nuisance. Plaintiffs have suffered no damages as their property, even with the increased duration of the runoff, has increased in value by $275,000.00.
5. Plaintiffs have not proved any diminution in rental value.
6. Plaintiffs have suffered no legal injury in that no additional property is subjected to water than was before construction of Defendants' improvements.
7. Plaintiffs' claims are barred due to the comparative fault of Plaintiffs in approving the 30" tile [pipe].
8. Plaintiffs' claims of lost profits to be made from the imagined subdivisions are speculative.

The chancery court thereby dismissed Appellants' claim against Appellees. The plaintiffs filed a notice of appeal to this Court on December 9, 2005.

II. ISSUES PRESENTED

On appeal, Mr. and Mrs. Russell present the following issues for our consideration:

1. Whether the trial court erred by not finding that the flooding constituted a temporary nuisance.
2. Whether the trial court erred by finding Appellants' claims to be barred by the statute of limitations.
3. Whether the trial court erred by denying Appellants monetary or injunctive relief.
4. Whether the trial court erred in finding Appellants' claims to be barred through the comparative fault of Mr. Russell.

For the following reasons, we find two of these issues to be dispositive of this appeal, and affirm.

III. STANDARD OF REVIEW

"Unless otherwise required by statute, review of findings of fact by the trial court in civil actions shall be *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d) (2006). "When the trial court has not made a specific finding of fact on a particular matter, however, we review the facts in the record under a purely *de novo* review." ***In re Valentine***, 79 S.W.3d 539, 546 (Tenn. 2002) (citing ***Fields v. State***, 40 S.W.3d 450, 457 n. 5 (Tenn. 2001)). A trial court's conclusions of law are subject to *de novo* review with no presumption of correctness. ***Campbell v. Fla. Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996).

"One of the most time-honored principles of appellate review is that trial courts are best situated to determine the credibility of the witnesses and to resolve factual disputes hinging on credibility determinations." ***Mitchell v. Archibald***, 971 S.W.2d 25, 29 (Tenn. Ct. App. 1999) (citing ***State v. Pruett***, 788 S.W.2d 559, 561 (Tenn. 1990); ***Tenn-Tex Properties v. Brownell-Electro, Inc.***, 778 S.W.2d 423, 425-26 (Tenn. 1989)). "Accordingly, appellate courts routinely decline to second-guess a trial court's credibility determinations unless there is concrete, clear, and convincing evidence to the contrary." ***Id.*** (citing ***Bingham v. Dyersburg Fabrics Co., Inc.***, 567 S.W.2d 169, 170 (Tenn. 1978); ***Thompson v. Creswell Indus. Supply, Inc.***, 936 S.W.2d 955, 957 (Tenn. Ct. App. 1999).

IV. DISCUSSION

We must first consider whether the flooding occurring on Appellants' property, if a nuisance, is properly characterized as permanent or temporary. The issue of whether a nuisance is temporary or permanent is a question of fact. ***Manis v. Gibson***, No. E2005-00007-COA-R3-CV, 2006 Tenn.

App. LEXIS 153, at *21 (Tenn. Ct. App. March 3, 2006) (citing ***Caldwell v. Knox Concrete Prods., Inc.***, 391 S.W.2d 5, 11 (Tenn. Ct. App. 1964)). In its final order, the chancery court did not explicitly state whether the alleged nuisance on Appellants' property was temporary or permanent, concluding instead that the claim was barred under both scenarios. Therefore, we review the characterization of the nuisance under a purely *de novo* standard. *See* ***In re Valentine***, 79 S.W.3d at 546. We find that the evidence supports a finding that if a nuisance existed, it was permanent in character.

"A nuisance has been defined as anything which annoys or disturbs the free use of one's property, or which renders its ordinary use or physical occupation uncomfortable." ***Caldwell v. Knox Concrete Products, Inc.***, 391 S.W.2d 5, 9 (Tenn. Ct. App. 1964). It is well settled in Tennessee that "a wrongful interference with the natural drainage of surface water causing injury to an adjoining landowner constitutes an actionable nuisance." ***Broyles v. Standifer***, No. E2005-02791-COA-R3-CV, 2006 Tenn. App. LEXIS 768, at *25 (Tenn. Ct. App. Dec. 4, 2006) (citing ***Butts v. City of South Fulton***, 565 S.W.2d 879, 881 (Tenn. Ct. App. 1977)). Regarding the distinctions between a temporary and permanent nuisance, the Eastern Section of this Court has stated:

> A temporary nuisance is defined as:
>
> [one] which can be corrected by the expenditure of labor or money . . . . Where the nuisance is temporary, damages to property affected by the nuisance are recurrent and may be recovered from time to time until the nuisance is abated. "The measure of such damages [is] the injury to the value of the use and enjoyment of the property, which may be measured to a large extent by the rental value of the property, and extent that rental value is diminished." [***Pate v. City of Martin***, 614 S.W.2d 46, 48 (Tenn. 1981)] (citations omitted). *Accord*, *e.g.*, ***Nashville v. Comer***, 88 Tenn. 415, 12 S.W. 1027, 1030 (Tenn. 1889); ***Harmon v. Louisville, New Orleans & Texas R.R. Co.***, 87 Tenn. 614, 11 S.W. 703, 704 (Tenn. 1889); ***Pryor v. Willoughby***, 36 S.W.3d 829, 831 (Tenn. Ct. App. 2000); ***Hayes v. City of Maryville***, 747 S.W.2d 346, 350 (Tenn. Ct. App. 1987); ***City of Murfreesboro v. Haynes***, 18 Tenn. App. 653, 82 S.W.2d 236, 238 (Tenn. Ct. App. 1935).
>
> A permanent nuisance is one that is "presumed to continue indefinitely, and is at once productive of all the damage which can ever result from it . . . ." ***Caldwell v. Knox Concrete Prods., Inc.***, 54 Tenn. App. 393, 391 S.W.2d 5, 11 (Tenn. Ct. App. 1964). The proper measure of damages for a permanent nuisance is "the injury to the fee or permanent value of the property . . . ." ***Louisville & Nashville Terminal Co. v. Lellyett***, 114 Tenn. 368, 85 S.W. 881, 890

(Tenn. 1905). *Accord, e.g.*, ***Harmon***, 11 S.W. at 704; ***City of Murfreesboro***, 82 S.W.2d at 238.

> As this Court has noted, neither definition of nuisance is entirely satisfactory because "nearly every nuisance could be abated by the devotion of enough time and money to it; and a permanent improvement to property may, in conjunction with the forces of nature, cause harm only periodically." ***Kearney v. Barrett***, No. 01-A-01-9407-CH-00356, 1995 Tenn. App. LEXIS 4, at *5 (Tenn. Ct. App. Jan. 4, 1995), *appl. perm. appeal denied* April 24, 1995. It is helpful to look, as did older Tennessee cases, at "whether the harm resulted from reasonable and lawful operations on the defendant's property . . . . (as opposed to negligent) and still interfered with the use and enjoyment of the plaintiff's property . . . ." *Id.* If the damages resulting from the nuisance are due to the fact that the defendant is "negligently operating its property so as to unnecessarily create the damage" and it is within the defendant's power to operate in a non-negligent manner, then the nuisance is temporary. ***Robertson v. Cincinnati, New Orleans & Texas Pacific Ry. Co.***, 207 Tenn. 272, 339 S.W.2d 6, 8 (Tenn. 1960). If, on the other hand, "the operation is done with due care considering the use thereof, and it is not contemplated that any change in operation will be made, the damage is permanent and the proper measure of damage is the injury to the fee." ***Butcher v. Jefferson City Cabinet Co.***, 59 Tenn. App. 59, 437 S.W.2d 256, 259 (Tenn. Ct. App. 1968) (emphasis in original).

Clabo v. Great Am. Resorts, Inc., 121 S.W.3d 668, 671-72 (Tenn. Ct. App. 2003).

Applying this rule, we believe that Appellants' claim was for a permanent nuisance. We find that any harm to Appellants' property adjacent to the sixteenth fairway of Willowbrook Golf Club is a result of reasonable and lawful operations on the defendants' property. Although Appellants claimed that the source of flooding on their property is the drainage pipe installed in 1995, they did not allege what, if any, acts of negligence in the drainage system's installation might have led to the backing up of water on their property. Appellants' 3.2 acres of property floods after periods of heavy rainfall, and the evidence supports a finding that this flooding will continue indefinitely. Furthermore, although Mr. Russell testified that the problem could be remedied through the expenditure of money and labor, Mr. Howard testified that area in question is now beneath a road that is maintained by Coffee County. Therefore, even if we were to find that the drainage system in place beneath the fairway since 1995 was installed or being operated by Appellees in a negligent manner, we cannot say that it is now within Willowbrook's control to operate in a non-negligent manner, as is required to find a temporary nuisance. *See* ***id.*** (citing ***Robertson v. Cincinnati, New Orleans & Texas Pacific Ry. Co.***, 207 Tenn. 272, 276, 339 S.W.2d 6, 8 (Tenn. 1960)).

We now turn to the issue of the statute of limitations. Tenn. Code Ann. § 28-3-105, under which Appellants pursued their claim, provides that actions for injuries to personal or real property shall be commenced within three years from the accruing of the cause of action. *See* Tenn. Code Ann. § 28-3-105 (2000). "When a nuisance is temporary and continuous, the continuation is a new offense entitling a plaintiff to recover damages occurring within the limitations period, even though the nuisance has existed longer than the limitations period." ***Anderson v. Am. Limestone Co.***, 168 S.W.3d 757, 761 (Tenn. Ct. App. 2004) (citing ***Kind v. Johnson City***, 478 S.W.2d 63, 66 (1970)). However, "[w]hen a nuisance is permanent, the statute of limitations commences to run from the time of the creation of the nuisance." ***Id.*** (citing ***Robertson v. Cincinnati, New Orleans & Texas P. Ry. Co.***, 339 S.W.2d 6, 9 (1960)); *see also* ***Mid-Am. Apartment. Cmtys., L.P. v. Country Walk Partners***, No. W2002-00032-COA-R3-CV, 2002 Tenn. App. LEXIS 938, at *8 (Tenn. Ct. App. Dec. 31, 2002) ("A cause of action arising from a permanent nuisance is subject to the three year limitations period for tort actions for injuries to personal or real property imposed by Tenn. Code Ann. § 28-3-105. ").

The three-year statute of limitations began to run from the time of the creation of the dam and installation of the drainage system on the sixteenth fairway of the golf course at Willowbrook Golf Club. Whether the instrumentality causing the backing up of water on Appellants' property was the height of the fairway itself or a deficiency in the drainage system installed beneath the fairway, it is undisputed that construction of the entire fairway was complete by September of 1995. This was the date, therefore, upon which the three-year statute of limitations began to run, and consequently Appellants' claim for a permanent nuisance was barred on September 30, 1998, as the trial court correctly stated in its final order. Appellants did not file their complaint until August of 2002. We therefore affirm the trial court's conclusion that Appellants' claim was time-barred based upon Tenn. Code Ann. § 28-3-105.

Because we have found that Appellants' claim was one for a permanent nuisance, and we have concluded that Appellants' claim for relief was thus time-barred in September of 1998, the remaining issues of injunctive or monetary relief and comparative fault are pretermitted.

V. CONCLUSION

For the aforementioned reasons, the judgment of the chancery court is affirmed. Costs are assessed against Appellants, Paul and Virginia Russell, and their surety, for which execution may issue if necessary.

_____

ALAN E. HIGHERS, JUDGE